Supreme Court, U. S.
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No. 98-6322

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

ANTONIO TONTON SLACK, Petitioner

v.

E.K. MCDANIEL, WARDEN, ELY, (NEVADA) STATE PRISON
and FRANKIE SUE DEL PAPA, ATTORNEY
GENERAL OF THE STATE OF NEVADA, Respondents

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT, U.S.

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I.

INTRODUCTION

Mr. Slack demonstrated in his certiorari petition how the Ninth Circuit's construction of "second or successive" habeas corpus petition is irreconcilable with this Court's interpretation of the same term in Stewart v. Martinez-Villareal, __ U.S. __, 118 S.Ct. 1618 (1998) – an intervening decision which the Ninth Circuit did not have the opportunity to consider when it denied a certificate of probable cause here and also when it issued Farmer v. McDaniel, 98 F.3d 1548 (9th Cir. 1996). The certiorari petition also showed that by applying McCleskey v. Zant, 499 U.S. 467 (1991) "abuse of the writ" standards to Mr. Slack's petition, and by labeling Mr. Slack's current petition as "second or successive" -- even though Mr. Slack's case is indisputably still undergoing the "first round" of federal habeas corpus review because his previous federal habeas corpus petition was dismissed without prejudice for exhaustion -- the Ninth Circuit issued an aberrant ruling that conflicts with all other court of appeals decisions. Even worse, the district court and the Ninth Circuit, by denying a certificate of probable cause in this case, totally prevented any examination of this issue despite the uniformly contrary decisions of other circuits as to what constitutes a "second or successive" petition.

The precise issue presented is accordingly whether, in light of this Court's intervening guidance in Martinez-Villareal, and the uniformly contrary construction of the term "second or successive" by the other courts of appeals, Mr. Slack's case presents a question that is "debatable among jurists of reason," which is all that is required to entitle him to a certificate of probable cause. E.g., Lozada v. Deeds, 495 U.S. 430, 432 (1991) (per curiam); Barefoot v. Estelle, 463 U.S. 880, 892-893 (1983). Mr. Slack's certiorari petition demonstrated why the answer to this question is "yes," and also submitted two alternative ways in which, consistent with prudential limitations on

this Court's review, the Ninth Circuit's fundamental error could be remedied: (1) Through the issuance of a summary grant, vacate and remand order, which would allow the Ninth Circuit to reconsider its ruling after full briefing concerning the controlling standards set forth by this Court in Martinez-Villareal; or (2) Through the grant of plenary review, which would allow this Court to address the split of authority created by the Ninth Circuit's unprecedented ruling.

In its opposition, the State of Nevada does not dispute the bulk of Mr. Slack's arguments. Indeed, the State does not even attempt to defend the fact that the Ninth Circuit's ruling rests on the premise that the issue presented by Mr. Slack is not even "debatable among jurists of reason." What is more, the State agrees that the Ninth Circuit did not have the benefit of this Court's ruling in Martinez-Villareal when it refused to allow Mr. Slack even to pursue an appeal, and the State agrees that an intervening decision of this Court provides the proper basis for issuance of a GVR order. Moreover, the State essentially agrees that the Ninth Circuit in Farmer construed "second or successive" differently than this Court did in its intervening decision in Martinez-Villareal. Nonetheless, the State argues that the Ninth Circuit should not even be given the opportunity to reconsider its contrary interpretation of the exact same term because the Martinez-Villareal court's ruling involved the provisions of the Anti-Terrorism and Effective Death Penalty Act, while Mr. Slack's case involved the functionally identical provisions in the Rules Governing Section 2254 Cases. The State similarly asserts that the Ninth Circuit's unprecedented ruling does not create a "split" of authority because, although the Ninth Circuit construed the term "second or successive" in a way that conflicts with both Martinez-Villareal and the decisions of virtually every other circuit, the other cases involved different narrow factual scenarios.

None of the State's contentions can withstand analysis. This case indisputably involves the same language and policy interests at issue in Martinez-Villareal, and the State has failed to provide

a single reason why identical pre-AEDPA language could be construed as containing more severe restrictions than its post-AEDPA counterpart. The reason for this omission, moreover, is plain: This Court's opinion in Martinez-Villareal allows only one proper construction of the term "second or successive" in all habeas corpus cases, and it is not the construction the Ninth Circuit has chosen. Specifically, Martinez-Villareal will not permit the term "second or successive" to include petitions, like Mr. Slack's, that have never received adjudication, and certainly will not permit the application of draconian McCleskey abuse of the writ standards to such petitions. Because the Ninth Circuit misconstrued the term "second or successive" in a way that is fundamentally irreconcilable with intervening authority of this Court and with the decisions of every other circuit to consider the issue, this Court should grant Mr. Slack's petition.

II.

THIS COURT SHOULD GRANT THE PETITION, VACATE THE JUDGMENT AND REMAND FOR FURTHER PROCEEDINGS, WHERE THE LOWER COURTS DID NOT CONSIDER THIS COURT'S INTERVENING DECISION IN STEWART V. MARTINEZ-VILLAREAL, U.S. , 118 S.CT. 1618 (1998),WHICH COMPLETELY UNDERMINES THE ANALYTICAL BASIS FOR THE LOWER COURTS' ORDERS IN THIS CASE.

As noted, the State of Nevada and Mr. Slack are essentially in agreement that this Court's decision in Martinez-Villareal is the type of intervening development that would justify issuance of a GVR order. See Opp. at 7; and see Lawrence v. Chater, 516 U.S. 163, 166-67 (1996). The State further acknowledges, as it must, that Martinez-Villareal construed the same "second or successive" language relied on by the lower courts in holding that Mr. Slack's claims were precluded under Rule 9(b) of the Rules That Govern Section 2254 Cases. Nonetheless, the State asserts that this Court should not issue a GVR order because "there is not a reasonable probability that the Ninth Circuit would reconsider the district court's decision." Opp. at 8. This contention cannot withstand

scrutiny.

The State first attempts to minimize Mr. Slack's likelihood of success on remand because "Stewart involves the interpretation of a statute that is not applicable to this case." Opp. at 7. Although the State does not say so explicitly, what the State apparently means by this argument is that it believes that the Ninth Circuit has intentionally – although not expressly – adopted a different definition of the term "second or successive" under Rule 9(b) than the one this Court adopted in Martinez-Villareal under 28 U.S.C. § 2244(b), and that the Ninth Circuit's decision to do so was proper. But the State fails to provide a shred of support for construing these identical terms differently, and without such support its position cannot prevail. The controlling law is clear that terms that have acquired a legal meaning are always construed to mean the same thing in the absence of compelling evidence to the contrary. E.g., Bradley v. United States, 410 U.S. 605, 609 (1973). Here, there is no evidence whatsoever that Congress intended the term "second or successive" to have different meanings in Rule 9(b) and 28 U.S.C. § 2244(b), and nothing in Martinez-Villareal would support giving the same language two radically different meanings. Moreover, the lower courts that have expressly addressed the issue have unanimously agreed that the terms should be construed the same way:

> Although the AEDPA's amendment to § 2244 imposes stricter requirements for 'second or successive' petitions than the pre-AEDPA 'abuse of the writ' standard in Rule 9(b), nothing in the AEDPA affects the determination of what constitutes a 'second or successive' petition.

In Re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997); accord Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996)("The 1996 legislation jettisons the concept of abuse of the writ in favor of more restrictive standards; it preserves the concept of the 'second or successive' petition. These words

therefore retain the same meaning they had under Rule 9(b).")[1] In fact, in a recent *en banc* opinion, the Ninth Circuit has now held that "abuse of the writ evolved as a judicially created equitable doctrine, but is now codified by the AEDPA." Calderon v. United States District Court (Kelly), __ F.3d __, 1998 WL 848032 *9 (December 8, 1998) (*en banc*). This recent *en banc* ruling establishes that, if this Court remands to the Ninth Circuit for reconsideration of whether the definition of "second or successive" under the old act is the same as the definition of that term set forth in Martinez-Villareal, Mr. Slack will likely prevail.

The State next attempts to minimize Mr. Slack's likelihood of success on remand by drawing narrow factual distinctions between this case and Martinez-Villareal; this attempt too must fail because, on a fundamental level, the State's opposition simply refuses to acknowledge both the holding and the language in Martinez-Villareal. For example, the State attempts to distinguish Martinez-Villareal as "turning on the nature of the claim involved, that is, that Martinez-Villareal was incompetent to be executed." Opp. at 8. But this Court in Martinez-Villareal did not draw any distinction on the basis of why the claim "could not have been adjudicated in [a] prior petition." See

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[1] As Mr. Slack explained in his petition, interpreting "second or successive" under Rule 9(b) consistently with this Court's definition of "second or successive" petition in Martinez-Villareal is also necessary to avoid absurd results which were obviously not intended by Congress. See United States v. Turkette, 452 U.S. 576, 580 (1981)(interpretation of enactments to avoid absurd results). Such an absurd result would arise by virtue of the fact that, under the State's position, which was adopted by the lower courts here and in Farmer v. McDaniel, 98 F.3d 1548 (9th Cir. 1996), a litigant like Mr. Slack, whose petition is subject to the supposedly more lenient pre-AEDPA standards, has had his claims barred by an application of the "second or successive" abuse doctrine to a petition that would not be "second or successive" at all under the new act. This would be directly contrary to the intent of Congress in adopting 28 U.S.C. § 2244(b), which was to supersede the abuse of the writ doctrine and replace it with "further restrict[ions]", Felker v. Turpin, 518 U.S. 651, 664 (1996), on the filing of "second or successive" petitions. Id.; Benton v. Washington, 106 F.3d at 164 ("The 1996 legislation jettisons the concept of abuse of the writ in favor of **more restrictive** standards"(Emphasis supplied.))

Gretzler v. Stewart, 146 F.3d 675, 676 (9th Cir. 1998). To the contrary, this Court explicitly equated the inability to adjudicate the Ford claim in Martinez-Villareal, because of its general unripeness, with the inability to adjudicate any claim in a mixed petition, because of the complete exhaustion rule of Rose v. Lundy, 455 U.S. 504, 522 (1982). 118 S.Ct. at 1622; see Martinez-Villareal v. Stewart, 118 F.3d at 633. The court's analysis equated them because "in both situations, the habeas petitioner does not receive an adjudication of his claim." 118 S.Ct. at 1622. This Court also made it clear that no res judicata effect attaches to a dismissal of a previous petition without prejudice for exhaustion, when it held that the Ford claim could be addressed on the merits because it "should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies." Martinez-Villareal, 118 S.Ct. at 1622. [2]

This Court's focus in Martinez-Villareal on the lack of adjudication of the claim in the prior petition is also entirely consistent with the Court's abuse analysis in McCleskey v. Zant, 499 U.S. 467 (1991). There, the Court imposed strict standards on the consideration of a "second or successive" petition, precisely because of the "vital relevance" of a "prior adjudication" of a habeas corpus petition. 499 U.S. at 482. Just as in McCleskey, the court in Martinez-Villareal focused on the absence of a prior adjudication of the claim, which was not affected by its previous dismissal without prejudice, in concluding that the renewed application was not a "second or successive" one. The basic problem with the Ninth Circuit's analysis (both here and in Farmer) is that it erases the

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[2] See e.g. Cooter & Gell v. Hartman Corp., 496 U.S. 384 (1990) (no bar to a second action after first was dismissed without prejudice); Lexecon v. Milberg Weiss, 102 F.3d 1524 (9th Cir. 1996) ("We have held that a dismissal without prejudice lacks res judicata effect."), rev'd on other grounds, 118 S.Ct 956 (1998); In re Corey, 892 F.2d 829, 835 (9th Cir. 1989) (presuming that silent dismissal order is without prejudice and explaining that "dismissal order therefore has no res judicata effect.") cert. denied, 498 U.S. 815 (1990); Humphreys v. United States, 272 F.2d 411, 412 (9th Cir. 1959) ("a suit dismissed without prejudice pursuant to Rule 41(a)(2) leaves the situation the same as if the suit had never been brought in the first place.").

distinction between a petition dismissed "without prejudice" for exhaustion and a petition fully adjudicated on the merits, by characterizing a later petition in both situations as a "second or successive" one, and thus accords a preclusive effect under the abuse doctrine to both kinds of initial petitions. The decision in Martinez-Villareal characterized this position as "seemingly perverse," held that none of this Court's precedents supported such an analysis, and focused on the critical lack of an adjudication of a prior petition in holding that a previous petition dismissed for exhaustion does not make a later petition a "second or successive" one. As a matter of substantive law, Martinez-Villareal thus requires the Ninth Circuit to acknowledge the distinction between the effect of prior petitions dismissed without prejudice for exhaustion and those adjudicated on the merits -- a distinction that was disregarded both in the ruling below, and in Farmer.

By focusing on the ultimate merits of the Martinez-Villareal issue, the state's opposition ignores the context of Mr. Slack's request for a GVR, which is the denial of a certificate of probable cause for appeal. The question before this court is whether the Ninth Circuit, if given the opportunity to reconsider this case in light of the intervening decision in Martinez-Villareal, would consider the issue sufficiently "debatable" to justify the issuance of a certificate of probable cause, and thus to allow Mr. Slack simply the opportunity to argue that point to the court of appeals. That is all Mr. Slack seeks by asking this court for a GVR; and the state's failure to address this point should be taken as a concession that a GVR should be granted to allow the merits of this point to be litigated in the court of appeals in the first instance. Accordingly, it is imperative that this Court grant the petition, vacate the decision below, and remand for further proceedings. The Ninth Circuit can then decide the issue after consideration of this Court's decision in Martinez-Villareal, as well as full briefing and oral argument.

III.

IF IT DOES NOT SUMMARILY REMAND THIS MATTER TO THE COURT OF APPEALS, THIS COURT SHOULD GRANT PLENARY REVIEW TO RESOLVE THE SPLIT OF AUTHORITY AMONG THE UNITED STATES COURTS OF APPEALS REGARDING WHETHER THE PROVISIONS OF RULE 9(B) GOVERNING "SECOND OR SUCCESSIVE" PETITIONS MAY BE PROPERLY INVOKED PRIOR TO THE COMPLETION OF THE "FIRST FULL ROUND" OF HABEAS CORPUS PROCEEDINGS

Mr. Slack also established in his certiorari petition why this Court should grant plenary review to address whether the provisions of Rule 9(b) may properly be invoked prior to the completion of the "first full round" of federal habeas corpus proceedings, if it declines to remand the case for reconsideration in light of Martinez-Villareal. As Mr. Slack explained in his petition, numerous decisions hold that a "second or successive" petition does not include one filed after a previous petition is dismissed for lack of complete exhaustion, but not a single decision agrees with the rulings in Farmer and here, which both hold that a "second or successive petition" under Rule 9(b) may include a petition filed after an earlier petition had been dismissed without prejudice due to lack of complete exhaustion. That split of authority, Mr. Slack asserted, warranted this Court's corrective intervention. See Supreme Court Rule 10(a).

In its opposition, the State acknowledges, as it must, that the type of circuit split described by Mr. Slack in his petition provides a proper basis for a grant of certiorari under Supreme Court Rule 10(a). The State also does not dispute -- because it cannot -- that, in pre-AEDPA cases, the Fifth, Seventh and Eighth Circuits have construed the term "second or successive" in a way that does not count earlier petitions that were dismissed for lack of exhaustion. E.g., Dellenbach v. Hanks, 76 F.3d 820, 822 (7th Cir. 1996) (per Posner, C.J.); Woods v. Whitley, 933 F.3d 321, 322 (5th Cir. 1991) (same); Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir. 1990). Similarly, the State cannot and

does not dispute that all of the circuits (including the Ninth) that have considered the meaning of the term "second or successive" petition under the AEDPA have likewise concluded that a petition filed after an earlier petition had been dismissed for lack of complete exhaustion is not a "second or successive" petition. [3] The State, moreover, cannot cite a single decision that agrees with the Farmer rule applied by the courts below.

Despite this abundance of authority from other federal courts of appeals construing the term "second or successive" differently than the Ninth Circuit did here, the State nonetheless insists that "there is no split of authority," Opp. at 9, because "not one of the cases [cited by Mr. Slack] is on

[3] E.g., In re Wilson, 142 F.3d 939, 940 (6th Cir. 1998) ("this court joined every other court to consider the question and held that a habeas petition filed after a previous petition was dismissed without prejudice for failure to exhaust state court remedies is not a 'second or successive' petition"); McWilliams v. State of Colorado, 121 F.3d 573, 575 (10th Cir. 1997) ("[w]e instead accept the view espoused by every circuit that has considered this issue since enactment of the Antiterrorism and Effective Death Penalty Act: a habeas petition filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies does not qualify as a 'second or successive' application within the meaning of § 2244(b)(1).") (citations omitted); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997) (agreeing with "the First, Second, Seventh, and Ninth Circuits," and holding, that a habeas petition filed after dismissal without prejudice for failure to exhaust is not a "second or successive" petition); Christy v. Horn, 115 F.3d 201,208 (3d Cir. 1997) ("We hold that when a prior petition has been dismissed without prejudice for failure to exhaust state remedies ... the petitioner may file his petition in the district court as if it were the first such filing."); Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996) (rejecting definition of "second or successive" petition that would include prior petitions dismissed for failure to exhaust and stressing that "[t]he sequence of filing, dismissal, exhaustion in state court, and refiling in federal court might generate multiple docket numbers, but it would not be right to characterize it as successive collateral attacks. The prisoner launched a single campaign; that skirmishes were spread across several years and two forums would not make it apt to call any of the steps a 'successive' collateral attack."); In re Turner, 101 F.3d 1323 (9th Cir. 1997) ("We hold that section 2244 does not apply to second or subsequent habeas petitions where the first petition was dismissed without prejudice for failure to exhaust state remedies"); Dickinson v. Maine, 101 F.3d 791 (1st Cir. 1996) (holding that petition, filed after first petition was dismissed for failure to exhaust, is not a "second or successive" one); Camarano v. Irvin, 98 F.3d 44, 46 (2d Cir. 1996) ("When a petition is dismissed without prejudice for failure to exhaust, there is no federal adjudication on the merits. To foreclose further habeas review in such cases would not curb abuses of the writ, but rather would bar federal habeas review altogether.").

point with this case," and because some of the cases cited by Mr. Slack involve the construction of the term "second or successive" as used in 28 U.S.C. § 2244, and not Rule 9(b). Opp. at 8-10. The State's arguments again lack merit.

First, the State's attempt to distinguish the pre-Act cases is nonsense. Although the State talks about various factual distinctions between this case and the opinions from other circuits, absent from the State's discussion is any mention of how this case -- in which the Ninth Circuit held that the mere existence of a previous habeas corpus petition, which was unadjudicated and dismissed without prejudice for lack of exhaustion, meant that a later petition was "second or successive" under Rule 9(b) -- can be meaningfully distinguished from Dellenbach, Hill and Woods. There simply is none. Judge Posner's opinion in Dellenbach, for example, holds that under the former 28 U.S.C. § 2244 (the statutory basis for Rule 9(b)), the filing of a third habeas corpus petition, after the dismissal of earlier petitions for lack of exhaustion, "was not an abuse of the writ" because "it is not an abuse of the writ to file a successive petition if the previous petitions were not denied on the merits." Dellenbach, 76 F.3d at 822. Hill likewise holds that a district court, in a pre-Act case, may properly apply the rules governing during the first round of federal habeas corpus to a second petition "because there had been no final determination on the merits of Hill's first petition." Hill, 894 F.2d at 1010.[4] And, the Fifth Circuit's decision in Woods, 933 F.2d at 322 squarely holds that, under McCleskey and Rule 9(b), abuse of the writ analysis applies only after a previous dismissal occurs "on the merits." All of these decisions, therefore, are directly contrary to the ruling below.

[4] The State's attempt to distinguish Hill – and all of the 28 U.S.C. § 2244 decisions – on the ground that "abuse of the writ is not mentioned anywhere in the Eighth Circuit's opinion," Opp. at 9, is completely illogical and clearly misguided. The Hill court found, as has every other court, that a petition filed after a previous dismissal for lack of exhaustion, is not "second or successive." Given this ruling, there was no need to address the issue of "abuse" and it does not appear in any of the opinions.

Second, the State once again argues that the numerous contrary interpretations of "second or successive" in post-AEDPA cases are irrelevant because "AEDPA does not apply to Mr. Slack's case." Opp. at 10. Once again, however, the State fails to acknowledge the reality that terms that have acquired a legal meaning are always construed to mean the same thing in the absence of compelling evidence to the contrary. E.g., Bradley, 410 U.S. at 609. The State likewise fails to acknowledge that several courts of appeals, including the Ninth Circuit, have already held that the AEDPA incorporates some of the concepts of abuse of the writ, including the term "second or successive," from pre-Act case law.[5] Because a substantial body of case law exists for the proposition that the term "second or successive" means the same thing under Rule 9(b) and 28 U.S.C. § 2244(b), AEDPA cases adopting a construction of that same term are relevant to the question of whether the Ninth Circuit's ruling here and in Farmer create a substantial split on this important issue.[6] More importantly, because all of these cases make clear that such a split does in

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[5] In Re Gasery, 116 F.3d at 1052; ("Although the AEDPA's amendment to § 2244 imposes stricter requirements for 'second or successive' petitions than the pre-AEDPA 'abuse of the writ' standard in Rule 9(b), nothing in the AEDPA affects the determination of what constitutes a 'second or successive' petition. Benton, 106 F.3d at 164 ("The 1996 legislation jettisons the concept of abuse of the writ in favor of more restrictive standards; it preserves the concept of the 'second or successive' petition. These words therefore retain the same meaning they had under Rule 9(b)."); Calderon v. United States District Court (Kelly), __ F.3d __, 1998 WL 848032 *9 (December 8, 1998) ("abuse of the writ evolved as a judicial created equitable doctrine, but is now codified by the AEDPA.").

[6] Even if the State were correct that the Ninth Circuit's rulings here and in Farmer intentionally rest on the unspoken premise that the pre-Act definition of "second or successive" radically differs from the post-Act definition contained in Martinez-Villareal, then the lower court rulings have diverged from the courts of appeals decisions in Gasery, Benton, and Kelly, which all hold that the AEDPA did not change the meaning of basic "abuse of the writ" concepts such as "second or successive" petition. Thus, even assuming *arguendo* that the Ninth Circuit here and in Farmer has intentionally taken the position that "second or successive" petition means something entirely different under Rule 9(b) than it does under 28 U.S.C. § 2244, a split of authority exists on that issue, which also warrants this Court's corrective intervention under (continued...)

fact exist, if this Court does not summarily grant, vacate and remand, it should grant plenary review to address and resolve that split.

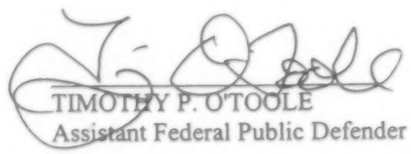
IV.

CONCLUSION

The State's opposition fails to provide a single credible reason that would support the denial of Mr. Slack's petition. The Ninth Circuit's summary determination that Mr. Slack's petition was "second or successive," and its summary application of the severe default rules of McCleskey before completion of the first round of habeas review, ran afoul of the intervening authority in Martinez-Villareal, as well as every other published opinion on the subject. The most efficient way to resolve this problem is to grant the petition, vacate the judgment and remand to the Court of Appeals for reconsideration in light of Martinez-Villareal. In the alternative, this Court should grant plenary review to resolve the split of authority created by the unprecedented decisions below.

Dated this 16th day of December, 1998.

Respectfully submitted,



TIMOTHY P. O'TOOLE
Assistant Federal Public Defender

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[6](...continued)
Supreme Court Rule 10(a).

CERTIFICATE OF SERVICE

ANTONIO TONTON SLACK,

Petitioner,

v.

E.K. MCDANIEL, WARDEN ELY (NEVADA) and FRANKIE SUE DEL PAPA ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on December 16, 1998, she served a copy of the attached REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI by personally placing a copy in the United States Mail, postage paid to the addressee named below:

David Sarnowski
Chief Deputy Attorney General
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K.C. Corradetti, Secretary